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ATTORNEY FOR APPELLANT:

JOSEPH LEON PAYNE
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**IN THE
COURT OF APPEALS OF INDIANA**

LEE JOHNSTON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 10A04-0601-CV-16
)	
SCOTT DYER,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Steven M. Fleece, Judge
Cause No. 10D03-0509-SC-1743

September 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Lee Johnston appeals from a judgment entered in favor of appellee-plaintiff Scott Dyer with regard to an action that Dyer brought against him in small claims court for an alleged breach of an agreement for the lease of certain real estate with an option to purchase. Specifically, Johnston contends that the trial court erred in denying him the opportunity to present evidence of property damages on his counterclaim against Dyer. Concluding that the trial court should have permitted Johnston to present evidence of the alleged damages, we reverse and remand for a new trial.

FACTS

Johnston was the owner of certain real estate in Henryville. On July 22, 2005, he negotiated with Dyer regarding the possible purchase of the property. The following day, Johnston presented Dyer with a lease with an option to purchase. On that day, Dyer paid Johnston \$1000 as consideration for the option to purchase. Both of the parties orally agreed that Dyer would pay Johnston \$400 per month in rent, Dyer would have an option to purchase the real estate for \$36,000, and if the option was exercised, Dyer would be afforded a credit for the \$1000 he had paid and one-half of the rent would be applied towards the purchase price.

Sometime later, Dyer determined that he wanted the option to purchase to last three or four years instead of one year. Dyer also wanted a guarantee that the hot water heater and furnace worked properly at the time of purchase. Thus, Dyer refused to sign the written agreement that Johnston had drafted. However, after Dyer had paid the \$1000, he began to make modifications to the residence. Specifically, Dyer tore out walls, removed kitchen

cabinets and closet doors, and changed some of the electrical wiring and receptacles.

On September 23, 2005, Dyer filed a small claims action against Johnston seeking damages from a “voided agreement . . . on [the] purchase of a house.” Appellant’s App. p. 1, 5. Johnston filed a counterclaim seeking damages for Dyer’s “breaking the terms of a lease.” Id. at 1, 6.

On December 5, 2005, the trial court conducted a hearing on the parties’ claims. At some point, the trial court refused to permit Johnston to present evidence of damages that Dyer had done to the property. In the end, the trial court entered a judgment in favor of Dyer in the amount of \$1000, finding that the parties had not entered into a contract for the purchase of the real estate. In relevant part, the trial court’s judgment provided as follows:

1. The Plaintiff and Defendant attempted to enter into a transaction that involved the lease/purchase of certain real estate.
2. The testimony of the parties clearly indicates that the parties had very different ideas as to what the terms of the transaction were to be. There was no true meeting of the minds.
3. No written agreement was ever signed. After the alleged agreement was reached, and the Plaintiff had paid the Defendant \$1000.00, the Defendant presented the Plaintiff a written contract to sign. Since the written contract did not comply with what the Plaintiff believed the agreement was or should have been, he declined to sign it.
4. The Plaintiff believed he had paid \$1,000.00 as a down payment on the purchase of real estate. The written contract referred to it as consideration for a lease.
5. Neither party was able to prove damages related to alleged improvements/damage the Plaintiff says he made to the real estate.
6. The parties made a failed attempt to enter into a contract. Their failure to initially agree on the terms of the agreement, and their failure to place the attempted agreement for the purchase of real estate into writing, has resulted in no enforceable contract being consummated.

7. The Plaintiff is therefore entitled to a return of the \$1,000.00 plus court costs of \$70.00 and post-judgment interest. The Defendant shall recover nothing on his counter-claim.

Appellant's App. p. 3-4. Johnston now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that Dyer chose not to file an appellee's brief. When an appellee fails to file a brief, we apply a less stringent standard of review. McKinney v. McKinney, 820 N.E.2d 682, 685 (Ind. Ct. App. 2005). We are under no obligation to undertake the burden of developing an argument for the appellee. Id. We may, therefore, reverse the trial court if the appellant establishes prima facie error. Id. "Prima facie" is defined as "at first sight, on first appearance, or on the face of it." Id. That said, our Supreme Court has stated the following standard of review to be used on appeal from a small claims judgment:

Judgments in small claims actions are "subject to review as prescribed by relevant Indiana rules and statutes." Ind. Small Claims Rule 11(A). In the appellate review of claims tried by the bench without a jury, the reviewing court shall not set aside the judgment "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A). In determining whether a judgment is clearly erroneous, the appellate tribunal does not reweigh the evidence or determine the credibility of witnesses but considers only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence. A judgment in favor of a party having the burden of proof will be affirmed if the evidence was such that from it a reasonable trier of fact could conclude that the elements of the party's claim were established by a preponderance of evidence. This deferential standard of review is particularly important in small claims actions, where trials are "informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law." Ind. Small Claims Rule 8(A).

City of Dunkirk Water & Sewage Dep't v. Hall, 657 N.E.2d 115, 116 (Ind. 1995).

II. Johnston's Claims

Johnston claims that he was denied the right to a fair hearing because the trial court improperly precluded him from presenting evidence on his counterclaim against Dyer. Specifically, Johnston argues that he should have been permitted to present evidence of the damage that Dyer did to the property.

In resolving this issue, we first note that a tenant can be held liable under a contract or tort theory to the landlord for any damages done by the tenant's actions in either performing the contract in a defective manner or in tort by breaching a duty to not demolish the property. See Strong v. Comm'l Carpet Co., Inc., 163 Ind.App. 145, 322 N.E.2d 387, 390 (Ind. Ct. App. 1975). In general, there are two ways to calculate damages when measuring a tortious injury to property attached to real estate. Terra-Products, Inc. v. Kraft Gen'l Foods, Inc., 653 N.E.2d 89, 91 (Ind. Ct. App. 1995). The measure of damages in a case of injury to real property depends first upon a determination of whether the damage is "permanent" or "temporary." Neal v. Bullock, 538 N.E.2d 308, 309 (Ind. Ct. App. 1989). A permanent injury is one in which the cost of restoring the property to its pre-injury condition exceeds the market value of the real property prior to the injury. Id. If the injury is permanent, the measure of damages is the value of the property before the injury. Warrick County v. Waste Mgmt. of Evansville, 732 N.E.2d 1255, 1258 (Ind. Ct. App. 2000). On the other hand, in cases where the injury is temporary or repairable, the measure of damages is the cost of repair. Id.

Here, while there was no written, signed option to purchase the property, the evidence established that there was an oral agreement between Dyer and Johnston for the lease of the property. Johnston claimed that Dyer had damaged the property, and although the trial court determined that there was no written agreement, it does not follow that Dyer was permitted to damage the property without liability to Johnston. That said, from the evidence presented at trial, it is apparent that Dyer's alleged damage to the property was of a temporary nature, and the damages would properly be measured by the cost of restoration. However, because Johnston was not permitted to present any evidence regarding these costs, the trial court erred in this respect. Thus, we are compelled to reverse the judgment of the trial court and remand this cause for a new trial to allow Johnston to present evidence of the damages and repair costs to the property.¹

The judgment of the trial court is reversed and remanded for a new trial.

VAIDIK, J., and CRONE, J., concur.

¹ As an aside, we note that Johnston advances an alternative argument for reversal. In essence, he contends that the trial court lacked jurisdiction over this matter in light of the determination that the agreement for the sale of the property was "void and . . . rescinded." Appellant's App. p. 4, Appellant's Br. p. 9-10. While small claims court jurisdiction may not extend to matters regarding an alleged breach of an agreement with an option to purchase real estate and/or the authority of a trial judge in a small claims matter to order extraordinary equitable relief such as rescission, small claims courts do have jurisdiction to hear matters that relate to claims for damages following the alleged breach of an oral lease agreement. See Ind. Code § 33-29-2-4.

